

BALANCING THE PENDULUM OF FREEDOM

BY

LIEUTENANT COLONEL STEPHEN R. DAY
United States Air Force Reserve

DISTRIBUTION STATEMENT A:

Approved for Public Release.
Distribution is Unlimited.

USAWC CLASS OF 2008

This SRP is submitted in partial fulfillment of the requirements of the Master of Strategic Studies Degree. The views expressed in this student academic research paper are those of the author and do not reflect the official policy or position of the Department of the Army, Department of Defense, or the U.S. Government.



U.S. Army War College, Carlisle Barracks, PA 17013-5050

| Report Documentation Page | | | Form Approved OMB No. 0704-0188 | | |
|--|------------------------------------|--|--|---|------------------------------------|
| Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. | | | | | |
| 1. REPORT DATE 15 MAR 2008 | | 2. REPORT TYPE Strategy Research Project | | 3. DATES COVERED 00-00-2007 to 00-00-2008 | |
| 4. TITLE AND SUBTITLE Balancing the Pendulum of Freedom | | | | 5a. CONTRACT NUMBER | |
| | | | | 5b. GRANT NUMBER | |
| | | | | 5c. PROGRAM ELEMENT NUMBER | |
| 6. AUTHOR(S) Stephen Day | | | | 5d. PROJECT NUMBER | |
| | | | | 5e. TASK NUMBER | |
| | | | | 5f. WORK UNIT NUMBER | |
| 7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) U.S. Army War College ,122 Forbes Ave.,Carlisle,PA,17013-5220 | | | | 8. PERFORMING ORGANIZATION REPORT NUMBER | |
| 9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) | | | | 10. SPONSOR/MONITOR'S ACRONYM(S) | |
| | | | | 11. SPONSOR/MONITOR'S REPORT NUMBER(S) | |
| 12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited | | | | | |
| 13. SUPPLEMENTARY NOTES | | | | | |
| 14. ABSTRACT See attached | | | | | |
| 15. SUBJECT TERMS | | | | | |
| 16. SECURITY CLASSIFICATION OF: | | | 17. LIMITATION OF ABSTRACT Same as Report (SAR) | 18. NUMBER OF PAGES 30 | 19a. NAME OF RESPONSIBLE PERSON |
| a. REPORT unclassified | b. ABSTRACT unclassified | c. THIS PAGE unclassified | | | |

The U.S. Army War College is accredited by the Commission on Higher Education of the Middle State Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

USAWC STRATEGY RESEARCH PROJECT

BALANCING THE PENDULUM OF FREEDOM

by

Lieutenant Colonel Stephen R. Day
United States Air Force Reserve

Dr. Douglas Johnson
Project Adviser

This SRP is submitted in partial fulfillment of the requirements of the Master of Strategic Studies Degree. The U.S. Army War College is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

The views expressed in this student academic research paper are those of the author and do not reflect the official policy or position of the Department of the Army, Department of Defense, or the U.S. Government.

U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

ABSTRACT

AUTHOR: Lieutenant Colonel Stephen R. Day

TITLE: Balancing the Pendulum of Freedom

FORMAT: Strategy Research Project

DATE: 25 March 2008 WORD COUNT: 5,159 PAGES: 30

KEY TERMS: Constitution, Bill of Rights, Executive Power, Homeland Security, Intelligence, Civil Liberty, Checks and Balances, USA PATRIOT Act, Protect America Act, FISA, FISC, GWOT

CLASSIFICATION: Unclassified

The Global War On Terror (GWOT) is about defending against relentless ideological enemies, bent on destroying the American way of life. The methods employed by components of our Homeland Security, intelligence, law enforcement, and military communities charged with protecting the United States must, however, be carefully measured. American citizens' individual civil liberties must be safeguarded from infringement against a backdrop of evolving intelligence requirements. This paper will examine several related questions. First, what laws, judicial rulings, executive orders, regulations, policies, and precedents govern U.S. intelligence gathering related to operations that could affect American citizens? Are governmental departments and agencies operating in compliance? Does our current legal framework permit the sort of intelligence collection, sharing, and dissemination needed? If not, how can the agencies charged with doing so continue collecting the domestic intelligence needed to meet homeland security requirements, without trampling on the very Constitution those of us in the military are sworn to defend? Thoughtful consideration of these issues is the key to a true "victory" in the GWOT, lest we sacrifice our way of life along the way.

BALANCING THE PENDULUM OF FREEDOM

Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.

—Benjamin Franklin¹

Background

According to Thomas Jefferson, “liberty yields” when government grows.² Such infringement on liberty was what led the thirteen original colonies to declare their independence from England. In addition to establishing a system of government, the purpose of the Constitution our forefathers crafted in 1787 was to “secure the Blessings of Liberty.”³ The Constitution, therefore, strikes an essential balance between opposing extremes of fascism and anarchy.

In 1791, a fledgling U.S. Congress added the first ten Amendments to that Constitution. Commonly known as the Bill of Rights, these Amendments guarantee the essential rights and liberties of individual American citizens.⁴ The Fourth and Fifth among them enumerate the right of people “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,”⁵ and not “deprived of life, liberty, or property, without due process of law,”⁶ respectively.

The most frequently quoted Supreme Court opinion regarding this implied “right of privacy” is Justice Louis Brandeis’s 1928 dissent in the case of *Olmstead v. U.S.*: “The principle underlying the Fourth and Fifth Amendments is protection against invasions of the sanctities of a man’s home and privacies of life.”⁷ “Every violation of the right to privacy must be deemed a violation of the Fourth Amendment... No federal official is authorized to commit a crime on behalf of the government.”⁸ The Supreme Court has, since the 1920s, also read the Fourteenth Amendment’s reference to “liberty” as

guaranteeing a relatively broad right of privacy.⁹ Such is the function of our judicial branch of government, to interpret the laws created by the legislative branch and enforced by executive branch.¹⁰ The Supreme Court is empowered to, among other things, ensure that legislation and government actions remain faithful to Constitutional principles. In doing so, the court performs its critical role as guardian of all Americans' civil liberties.¹¹

Throughout history, events have caused the pendulum of freedom to swing between security and liberty. Examples of security trumping liberty include the Alien and Sedition Acts of 1798, the Espionage Act of 1917, internment of American citizens during World War II, blacklisting of alleged communist sympathizers during the McCarthy era, and the treatment of antiwar protesters during the Vietnam War. Few today would defend these measures and, in each case, governmental apologies were required after-the-fact.¹²

The first test on limiting freedom of speech and freedom of the press came in 1798, as the United States faced the possibility of war with France. Fearing that resident aliens might sympathize with the French, the Federalist government pushed the pendulum of freedom toward security by labeling criticism of its policies disloyal. The ensuing Alien and Sedition Acts tightened restrictions on foreign-born Americans and limited speech critical of the government's actions. Increasing the residency requirement for citizenship from five to fourteen years, these laws also authorized the arrest, imprisonment, and deportation of aliens during wartime,¹³ while making it a crime for American citizens to "write, print, utter or publish... any false, scandalous and malicious writing or writings against the government of the United States."¹⁴ Resulting

Sedition Act trials, and the Senate's heavily criticized use of its contempt powers to suppress dissent, culminated with the Federalists' electoral defeat in 1800. Thereafter, the Acts were repealed or allowed to expire,¹⁵ moving the pendulum of freedom back toward liberty.

Shortly after the U.S. entered World War I, President Woodrow Wilson advocated passage of the Espionage Act of 1917 and Sedition Act of 1918, swinging the pendulum of freedom back toward security. The former made it a crime for anyone to interfere with the war effort through something as simple as denouncing the draft, while the latter imposed heavy penalties on anyone convicted of criticizing the Constitution, the government, the military, or the flag. According to the University of Chicago's Geoffrey R. Stone, these laws represent "some of the most repressive legislation with respect to free speech" in the nation's history.¹⁶ Approximately 2,000 people were convicted under the Sedition Act, including Socialist Party presidential candidate Eugene V. Debs, who was sentenced to ten years in prison for making speeches critical of the government's motives for going to war,¹⁷ and the draft in particular.¹⁸ The Supreme Court upheld the convictions of those tried under the two laws at the time, but eventually overturned all of its decisions related to the Sedition and Espionage Acts. Congress repealed the Sedition Act in 1920 and President Wilson offered clemency to most of those convicted under the Sedition and Espionage Acts in 1921.¹⁹ Debs was eventually pardoned by President Warren G. Harding.²⁰ The Espionage Act remains on the books today.²¹

The treatment of Japanese and, to a somewhat lesser extent, German and Italian Americans during World War II provides an excellent example of governmental excess in the name of security. In issuing Executive Order 9066, President Roosevelt pushed

the pendulum of freedom toward security when he authorized the establishment of fifty- to sixty-mile-wide “military areas,” spanning the West Coast and extending east to Arizona. The order called for internment of citizens banned from these zones at “assembly centers.”²² Congress codified the order with its subsequent passage of Public Law 503, on 21 March 1942. In the months that followed, nearly 70,000 American citizens were confined in these “isolated, fenced, and guarded” facilities with no charges having been filed against them, nor any ability to appeal their detention. Legal challenges at the time resulted in the Supreme Court upholding the law’s legality.²³ Over forty years later, with passage of Civil Liberties Act of 1988, the United States finally acknowledged the “fundamental injustice” of what had been done and apologized.²⁴

Widespread abuses by American intelligence agencies over a period of decades, including eavesdropping on Vietnam War protesters and civil rights activists, became public in the 1970s. The ensuing passage of the Foreign Intelligence Surveillance Act (FISA) of 1978 moved the pendulum of freedom back toward liberty. Imposing strict limits on domestic intelligence gathering operations,²⁵ it preserved a means for the executive branch to conduct surveillance relating to foreign intelligence investigations, without meeting the Fourth Amendment’s rigorous probable cause standard.²⁶ FISA established procedures through which government investigators could obtain judicial authorization for electronic surveillance and physical search of persons suspected of espionage or international terrorism against the United States. It called for such requests to be considered by a special, seven-member Foreign Intelligence Surveillance Court (FISC).²⁷ The standard of proof required to obtain a warrant from the

FISC is lower than that required for a criminal warrant.²⁸ From its inception through 2006, the court rejected only five of the 22,987 applications it received.²⁹ The FISC can grant emergency approval of warrant applications “within hours.”³⁰ FISA even empowers the Attorney General to authorize immediate surveillance in emergency situations, provided judicial review of the decision is sought “as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance.”³¹

Modern Challenges

The terrorist attacks of 11 September 2001 (9/11) altered how many Americans view “homeland security” and, more importantly, what might be required to preserve it.³² Since the attacks, President Bush has repeatedly asserted, “government has no higher obligation than to protect the lives and livelihoods of its citizens.”³³ The President and Congress have taken numerous steps to enhance the government’s ability to prevent terrorist attacks by proactively deterring, disrupting, and disabling terrorist networks.³⁴

Congress weighed-in initially with passage of Public Law 107-40, the Authorization for Use of Military Force (AUMF) Against Terrorists, on 18 September 2001. It gave the President the authority “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”³⁵ This is the authority under which the ongoing Global War On Terrorism (GWOT) is waged.

Congress followed-up with passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA

PATRIOT) Act on 24 October 2001. The Act provided for enhanced surveillance procedures, addressed international money laundering, tightened border security, removed obstacles to investigating terrorism, increased information sharing for protection of critical infrastructure, strengthened laws against terrorism, and improved intelligence gathering capabilities. In doing so, however, portions of it undermined the system of judicial review that normally safeguards civil liberties and pressed the pendulum of freedom toward a more security-centric position.³⁶

Granting broad latitude to federal agencies engaged in intelligence gathering related to possible terrorist activities, the USA PATRIOT Act significantly eased FISA restrictions. It broadened the government's authority to monitor private communications and access personal information, adding a number of terrorism and cyber-related crimes to the list of offenses justifying surveillance via wiretap, and legalizing "roving" wiretaps. The Act introduced the concept of so-called "Sneak and Peek" searches, eliminating the requirement that law enforcement provide the subject of a search warrant with concurrent notice of the search.³⁷ It expanded the application of FISA to situations where foreign intelligence gathering is merely a "significant" purpose of the investigation, rather than the "sole or primary" purpose.³⁸ The Act imposed new regulations on financial institutions, requiring them to gather additional personal information from their customers and report it to government agencies. It increased State Department and Immigration and Naturalization Service (INS) access to the criminal records of people attempting to enter the United States. The Act mandates better coordination and greater information sharing between intelligence and law enforcement agencies. It also increased maximum penalties for terrorism-related

offenses, and clarified lines of responsibility among various federal agencies charged with responding to terrorist activities.³⁹

As James Madison put it in Federalist #10, “Enlightened statesmen will not always be at the helm.”⁴⁰ Years later, President Lyndon Johnson observed that “you do not examine legislation in the light of the benefits it will convey if properly administered, but in the light of the wrongs it would do and the harms it would cause if improperly administered.”⁴¹ Despite these self-evident truths, the USA PATRIOT Act received almost none of the thorough review and thoughtful debate such sweeping legislation was due. According to Representative Jerrold Nadler (D-NY), most members did not even read the bill for which they voted. Only two copies of the 187-page bill were printed by 10:00 AM on the day it was considered.⁴² Despite this fact, the bill was passed by an overwhelming 357 to 66 House majority at 11:05 AM.⁴³ Those voting to approve the dubious legislation were obviously unfamiliar with a 1972 Supreme Court ruling that recognized the historical “tendency of Government - however benevolent and benign its motives...” to abuse its power in acting to protect “domestic security.”⁴⁴ With almost no debate, and without House, Senate, or Conference reports, the USA PATRIOT Act lacks the background legislative history that would otherwise assist with statutory interpretation.⁴⁵

Government Compliance

As early as 21 September 2001, the Justice Department issued an opinion regarding the Constitutionality of domestic GWOT activities. Bush appointee John C. Yoo raised the issue of potential conflicts with the Fourth Amendment’s protection from unreasonable search and seizure. He noted that “the government may be justified in

taking measures which in less troubled conditions could be seen as infringements of individual liberties.”⁴⁶ He went on to write that, “the Fourth Amendment should be no more relevant than it would be in cases of invasion or insurrection,” if the President decides the threat justifies deploying the military inside the country.⁴⁷

This may be what President Bush had in mind when he signed a secret order in 2002, authorizing the National Security Agency (NSA) to eavesdrop on American citizens and others inside the United States, without court-approved warrants, to search for evidence of terrorist activity.⁴⁸ Not satisfied with the USA PATRIOT Act’s expanded application of FISA to situations where foreign intelligence gathering is merely a “significant” purpose;⁴⁹ the FISC’s lower standard of proof, ability to grant emergency approval of warrant applications “within hours”⁵⁰ and established history of rubber-stamping government requests;⁵¹ or the Attorney General’s existing authority to authorize immediate surveillance in emergency situations,⁵² the administration claims “warrantless wiretapping” is essential for the NSA to move “quickly” in monitoring communications that could expose threats to the United States. Its defense of this dubious program is based on classified legal opinions that assert the President’s broad power to order such searches is derived, in part, from the 2001 Congressional AUMF in pursuit of Al Qaeda and Associated Movements. Contradictory arguments have, however, been the administration’s hallmark in defending the legality of a program that depends on operational details too secret to be revealed. For instance, it separately asserted that the program’s legality is a non-issue. In 2002, the Justice Department filed a brief asserting “the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers

or their agents, and Congress cannot by statute extinguish that constitutional authority.”⁵³

Unfortunately, broad authority like this is easily abused. Citing “exigent circumstances,” Federal Bureau of Investigation (FBI) demands for customers’ private information from telecommunications companies went far beyond just the phone records of those under suspicion. FBI agents used boilerplate language to cast a wide net for “community of interest” data that also included analyses of the customers’ broader patterns of communication. The Justice Department’s inspector general has since discovered 700 cases in which the FBI asserted that grand jury subpoenas had been sought for the data in question when, in fact, the subpoenas were never requested.⁵⁴

These programs are, of course, not without their critics. In 2004, U.S. District Judge Victor Marrero ruled a related aspect of the USA PATRIOT Act unconstitutional because it allows the FBI to demand information from Internet service providers without judicial oversight or public review. So-called National Security Letters (NSL) required no court approval or judicial review, and prohibited targeted companies from revealing that the demands were ever made. Judge Marrero’s harshly worded ruling said the use of such letters “‘effectively bars or substantially deters any judicial challenge,’ and violates free-speech rights by imposing permanent silence on targeted companies. Writing that ‘democracy abhors undue secrecy,’ he ruled that ‘an unlimited government warrant to conceal... has no place in our open society.’”⁵⁵ Congress amended the NSL provision in its 2006 reauthorization of the USA PATRIOT Act, before an appeals court could hear the government’s appeal.⁵⁶

When the revised NSL provision was sent to Judge Marrero, the American Civil Liberties Union (ACLU) argued that the NSL secrecy requirement amounts to a gag order without judicial authorization. According to the ACLU, the requirement for NSL recipients to keep them a secret undermines the judiciary's check on the executive branch's power, by requiring judges to defer to the FBI's view that secrecy is necessary. In siding with the ACLU, Judge Marrero ruled that such a gag order does, indeed, violate the First Amendment's guarantee of free speech.⁵⁷

The clandestine nature of these data-mining operations is responsible for squandering supposedly scarce resources available to investigate the countless suspect circumstances and incidents brought to light by our increased vigilance. A prime example of such duplication of effort was found in the FBI monitoring a terrorist suspect, with a FISA-approved warrant, while the NSA expended resources of its own on the same target, without FISA approval.⁵⁸ Unusually "strict compartmentalization" is, however, another hallmark of such dubious administration programs. Perhaps the epitome of this was seen when NSA lawyers were not permitted to review the Justice Department's legal analysis of what the NSA was doing.⁵⁹

A complaint from Judge Colleen Kollar-Kotelly, the federal judge who oversees the FISC, helped spur a 2004 suspension and revision of the program.⁶⁰ Outrage over the eavesdropping program has spawned at least 50 lawsuits, alleging customer records were illegally surrendered, against both telecommunications companies and the government.⁶¹ Oregon lawyer Brandon Mayfield, whom the FBI wrongly accused in the 2004 Madrid terrorist bombings, has urged a judge to strike down provisions of the USA PATRIOT Act. Based on an erroneous fingerprint match, federal authorities searched

Mayfield's home and office, going through his personal effects and installing electronic listening devices. Mayfield was held in prison for two weeks before finally being released. He has since received a \$2 million settlement from the federal government and a formal apology from the FBI.⁶²

In addition to claiming its own "inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise),"⁶³ the Bush Administration is now seeking retroactive legal immunity for the telecommunications companies accused of helping them establish and run the program. The proposal would shield anyone who "provided information, infrastructure or 'any other form of assistance' to the intelligence agencies."⁶⁴ To guard against divulging which companies participate in the surveillance activities, the administration has asked Congress to empower the Attorney General to "intervene on behalf of any person or company accused of participating in the surveillance work, whether or not they actually did."⁶⁵ Congressional critics of the vaguely worded proposal include those who believe telecommunications company lawyers failed in their responsibility to ensure the requests were not an abuse of government authority, along with those concerned that the legislation could shield government officials who may have broken the law.⁶⁶

Just last summer, the administration approved a plan to expand domestic law enforcement officials' access to data obtained from (military) "satellite and aircraft sensors that can see through cloud cover and even penetrate buildings and underground bunkers."⁶⁷ Under the program, spearheaded by the Director of National Intelligence and the Department of Homeland Security, state and local law enforcement officials will be able to leverage technology once reserved for foreign intelligence

gathering. In addition to standard imagery, information gathered from “ground-penetrating radar and highly sensitive detectors that can sense electromagnetic activity, radioactivity or traces of chemicals”⁶⁸ is included in the program. The potential utility of law-enforcement access to this kind of information is obvious. The policy shift does, however, blur a well-established boundary governing the use of military assets for domestic law enforcement operations.⁶⁹ In doing so, it opens the door to possible legal challenge.

As the Cato Institute's Roger Pilon notes, “This is now an executive branch that thinks it's a law unto itself.”⁷⁰ As if to prove this point, Attorney General John Ashcroft permitted federal agents to monitor political and religious activities, without demonstration of any grounds for suspicion, when he “expressly authorized the FBI to enter any place or attend any event that is open to the public in order to gather information that may be relevant to criminal activity.”⁷¹ According to Ashcroft, “We don't need any leads or preliminary investigations” to authorize surreptitiously sending FBI agents into “meetings, churches, mosques, or any public place.”⁷² Gone is the requirement to establish probable cause.⁷³

The Way Ahead

Civil liberties guaranteed by the Bill of Rights, including individuals' rights “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,”⁷⁴ and not “deprived of life, liberty, or property, without due process of law,”⁷⁵ are among the things unique to America that make it the greatest country in the world. According to President Bush, however, “Our job – our government's greatest responsibility is to protect the American people. That's our most important job.”⁷⁶

Unfortunately, this bears little resemblance to his Oath of Office which states, “I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my Ability, preserve, protect, and defend the Constitution of the United States.”⁷⁷ According to the Constitution, then, safeguarding civil liberties is the greatest responsibility of government.

The President labels intelligence as “our first line of defense against terrorists...”⁷⁸ Admittedly, it would be considerably easier to catch terrorists if we lived in a police state. That would not, however, be the United States of America. According to the Supreme Court, in fact, “The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.”⁷⁹

The administration’s contention that the President is vested with the authority to conduct warrantless surveillance within the U.S. by both the AUMF and the “inherent authority” of his office⁸⁰ are, at best, implausible. The AUMF contains no explicit elimination of FISA requirements or relaxation of its restrictions, and “repeal by implication” has been consistently frowned upon under the law.⁸¹ The claim of “inherent authority”⁸² also falls short of Constitutional requirements. The Constitution confers on Congress the explicit Power “To make Rules for the Government and Regulation of the land and naval Forces,”⁸³ without limitation. According to Article 2, Section 2, “The President shall be Commander in Chief of the Army and Navy of the United States...”⁸⁴ Taken in context, the absence of the word “Power,” and use of the verb “shall be” are

noteworthy. Inferring an “inherent” Presidential power upsets the Constitutional balance between our government’s executive and legislative branches. Doing so invites an inevitable showdown over whether “inherent” Presidential power, or that which is explicitly stated for Congress, has priority.⁸⁵

The Bush Administration’s response to the 9/11 terrorist attacks fails to strike an appropriate balance between security and liberty, charging an unacceptably high price in liberty lost to push the pendulum of freedom toward security. According to former Justice Department lawyer and Harvard Law Professor Jack L. Goldsmith, top administration officials “treated the Foreign Intelligence Surveillance Act the same way they handled other laws they objected to: ‘They blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.’”⁸⁶ Mr. Goldsmith recalls Vice Presidential aid David Addington saying “We’re one bomb away from getting rid of that obnoxious [FISA] court,” in early 2004.⁸⁷

Individual civil liberties and limited government are vanguards of what it is to be American. Expansionist government at the expense of our civil liberties is a victory, of sorts, for those against whom we wage the ongoing war on terror. Adding insult to injury, the end result of such ill-advised measures may not even be increased security. Should the administration’s methods and tactics be declared unconstitutional, terrorists are likely to go free, rendering us no safer than we were on 9/11. The question, then, is how to secure liberty in a manner that does not extinguish it?

The FISC did eventually rule that the Bush Administration’s warrantless wiretapping program violated the FISA. A subsequent high-pressure campaign by the

White House that capitalized on Democratic fears of being seen as weak on terrorism,⁸⁸ and included dire warnings from Director of National Intelligence (DNI) Michael McConnell regarding potential GWOT impact from the measure's non-renewal,⁸⁹ prompted a harried Congressional overhaul of espionage laws enacted thirty years ago. At least one Democratic lawmaker described caucus discussion of the changes as "tantamount to being railroaded."⁹⁰

The resulting Protect America Act of 2007 modernized FISA by permitting "spy operations that go well beyond wiretapping to include — without court approval — certain types of physical searches on American soil and the collection of Americans' business records."⁹¹ White House assurances, that the law is not intended "to affect in any way the legitimate privacy rights" of Americans,⁹² ring somewhat hollow. While arguably targeting people "believed to be located outside the U.S.,"⁹³ the administration rejected a Democratic compromise because it included checks on executive surveillance authority.⁹⁴ According to experts on national security law, the approved legislation may actually permit the government "to collect a range of information on American citizens inside the United States without warrants."⁹⁵

The fact that modern digital communications between people outside the U.S. are frequently routed through the same network infrastructure that carries U.S. citizens' communications,⁹⁶ combined with the wide net cast for "community of interest" data,⁹⁷ renders Americans' privacy rights largely impotent. Cloaked in national security secrecy, target selection is left to the DNI and the Attorney General. No one outside the executive branch has to review or approve their decisions. FISC oversight is limited to considering whether the government's target selection guidelines are appropriate.⁹⁸

Fourth Amendment protection against “unreasonable searches and seizures” requires that those charged with deciding which privacy rights are legitimate must be separate and distinct from those responsible for searching and seizing. The purpose of judicial review is to avoid placing exclusive trust in the integrity, objectivity, and competence of those responsible for enforcing the law. Unfortunately, the Protect America Act of 2007 represents yet another enhancement of the executive branch’s power at the expense of its Constitutional co-equals’ authority.⁹⁹ Until overturned by the courts or allowed by Congress to sunset when it expires in early 2008, the executive branch enjoys unilateral authority to approve and conduct surveillance.

As Harvard Law Professor Charles Fried described it, the Bush Administration has “badly overplayed a winning hand.”¹⁰⁰ Ignoring the axiom that real Presidential power is the power to persuade, the President abandoned bipartisanship in favor of a legalistic “go-it-alone approach.”¹⁰¹ According to former Justice Department lawyer and Harvard Law Professor Jack L. Goldsmith, the Bush Administration operates on a concept of power that relies on “minimal deliberation, unilateral action and legalistic defense.”¹⁰²

Recommendations

The events of September 11 convinced... overwhelming majorities in Congress that law enforcement and national security officials need new legal tools to fight terrorism. But we should not forget what gave rise to the original opposition—many aspects of the bill increase the opportunity for law enforcement and the intelligence community to return to an era where they monitored and sometimes harassed individuals who were merely exercising their First Amendment rights. Nothing that occurred on September 11 mandates that we return to such an era. If anything, the events of September 11 should redouble our resolve to protect the rights we as Americans cherish.¹⁰³

Even with the tragedy of 9/11 fresh in their minds, 58 percent of respondents to a November 2001 *Investor’s Business Daily* poll worried about losing “certain civil liberties

in light of recently passed anti-terrorism laws.”¹⁰⁴ By March 2002, a similar Time/CNN poll revealed 62 percent of respondents were concerned that “the U.S. Government might go too far in restricting civil liberties.”¹⁰⁵ More than just national security is being tested by the events of 9/11, and the GWOT that has unfolded since. Our commitment to Constitutional principles—our civil liberties and democratic way of life—have been repeatedly challenged by the administration’s willingness to sacrifice freedom in the name of keeping us “safe,” along with Congressional failure to challenge those decisions.

We must redouble our vigilance to protect the individual freedoms guaranteed by the Bill of Rights and preserve our values. The U.S. can, in fact, prosecute the GWOT while safeguarding the Constitutional balance of power. The first step is for the current administration and all those following it to recognize that no one, including the executive branch of government, is above the law.¹⁰⁶ It must abandon its apparent contempt for civil liberties by scrapping its ill-conceived warrantless wiretapping program. The President must work with Congress to streamline our national intelligence apparatus and update pertinent laws, like FISA, in a manner consistent with the Bill of Rights. It is, after all, part of the Constitution that the President swore to “preserve, protect, and defend.”¹⁰⁷

A good place to start is within the intelligence community itself, with the decade-old Commission on Roles and Capabilities of the U.S. Intelligence Community Report. Intelligence agencies need better direction from the policy level, regarding both the roles they perform, and what they collect and analyze. Policymakers must develop a better understanding, and greater appreciation, of what the community’s products and

services can offer them. Intelligence agencies need to function more effectively as a “community,” through an increased commitment to unifying disparate facets and breaking down administrative barriers. Intelligence must also be more closely integrated with other functions of government, like law enforcement, to achieve shared objectives.¹⁰⁸ The key is to establish relationships and develop processes to enhance collaboration among the nation’s sixteen intelligence agencies.¹⁰⁹ The more desirable portions of the USA PATRIOT Act make progress in this regard, and should be maintained. They must, however, be tempered by congressional oversight and judicial review, consistent with the Constitution and sufficient to ensure the preservation of civil liberties.

Greater use of modern management practices could go a long way toward improving flawed processes for allocating intelligence resources. Duplicative personnel and administrative systems among intelligence agencies create inefficiencies. Their rapidly increasing cost saps resources that could, otherwise, be invested in new technologies and a much-needed reinvigoration of Human Intelligence (HUMINT) capabilities, including substantially more linguists. The need for timely and coherent fusion of data from interagency and coalition sources is vital.¹¹⁰ Perhaps the most critical need is for increased emphasis on analysts capable of turning voluminous quantities of raw data into actionable intelligence.¹¹¹

Another part of the USA PATRIOT Act that should be revisited is further expansion, in both number and location, of FISC judges to ensure adequate judicial review of burgeoning intelligence requirements. In spite of the FISC’s ability to grant warrant approval “within hours,”¹¹² and the Attorney General’s existing authority to

approve immediate surveillance in emergency situations,¹¹³ more FISC judges in more locations would minimize the government's ability to claim a "need" to bypass judicial review.

The use of NSLs should be abandoned, in favor of warrants issued by proper judicial authority. If they have to be continued for some reason, they must be subject to Congressional oversight and judicial review. Individual citizens targeted with these instruments must also have the ability to challenge both their scope and classification, through the judicial process.

Congress must reassert itself as a rightful check against unbridled executive power. Increasing Congressional oversight and judicial review, through a more deliberative and cooperative partnership between the three branches of our government, ensures a bipartisan process built upon the checks and balances that have protected individual civil liberties for hundreds of years. This also enhances shared responsibility across the branches of the government, preventing any one from grabbing too much authority at the others' expense. The American people must demand nothing less from their elected representatives, and exercise their right to replace those who do not measure up.

Reform is always painful for bureaucratic organizations. Nothing here, however, requires erosion of the clear barriers that must remain between permissive rules governing foreign intelligence gathering operations and the necessarily stricter ones limiting such operations targeting of American citizens. Legislation that might infringe individual civil liberties must include so-called "sunset" clauses to ensure periodic review, in light of current events. We must avoid fixing what is not broken, like our

government's system of checks and balances. The pendulum of freedom must not be pushed too far toward security, upsetting the Constitutional balance of power and undermining the Bill of Rights.

Endnotes

¹ Leonard W. Labaree, ed., *The Papers of Benjamin Franklin* (New Haven, CT: Yale University Press, 1963), 242; quoted in Suzy Platt, *Respectfully Quoted: A Dictionary of Quotations* (New York: Dorset Press, 1989); available from <http://www.bartleby.com/73/1056.html>; Internet; accessed 3 September 2007.

² Stephen Moore, "Uncle Sam, Inc.," *National Review Online*, 2 February 2004 [journal online]; available from <http://www.nationalreview.com/moore/moore200402020906.asp>; Internet; accessed 3 September 2007.

³ *U.S. Constitution*, Preamble.

⁴ "The Bill of Rights," linked from *Primary Documents in American History*, available from <http://www.loc.gov/rr/program/bib/ourdocs/billofrights.html>; Internet; accessed 3 September 2007.

⁵ *U.S. Constitution*, Amendment IV.

⁶ *Ibid.*, Amendment V.

⁷ Doug Linder, "The Right of Privacy," linked from *The Exploring Constitutional Law Home Page*, available from <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html>; Internet; accessed 3 September 2007.

⁸ Mark Stevens, "Justice 410 Constitutional Law Syllabus," linked from *North Carolina Wesleyan College Adult Degree Program Page*, available from <http://faculty.ncwc.edu/Mstevens/410/410lect16.htm>; Internet; accessed 3 September 2007.

⁹ Linder.

¹⁰ *U.S. Constitution*, art. 3, sec. 1.

¹¹ "Extra!: Supreme Court," linked from *CNN Education Page*, available from <http://www.cnn.com/2005/EDUCATION/08/11/extra.supreme.court/>; Internet; accessed 3 September 2007.

¹² Jane Adas, "New York Congressman Nadler Calls USA PATRIOT Act Extreme Danger to Civil Rights," *The Washington Report on Middle East Affairs* (August 2002): 57-58.

¹³ "Alien and Sedition Acts (1798)," linked from *Our Documents Home Page*, available from <http://www.ourdocuments.gov/doc.php?flash=true&doc=16>; Internet; accessed 3 September 2007.

¹⁴ "The Alien and Sedition Acts," linked from *The Avalon Project at Yale Law School*, available from <http://www.yale.edu/lawweb/avalon/statutes/sedact.htm>; Internet; accessed 3 September 2007.

¹⁵ "Alien and Sedition Acts (1798)."

¹⁶ Geoffrey R. Stone, "Perilous Times; Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism," linked from the *Woodrow Wilson International Center for Scholars Home Page*, available from http://www.wilsoncenter.org/index.cfm?event_id=102943&fuseaction=events.event_summary; Internet; accessed 3 September 2007.

¹⁷ Ibid.

¹⁸ "Eugene V. Debs," *Time Magazine*, 1 November 1926 [journal on-line]; available from <http://www.time.com/time/magazine/article/0,9171,722648,00.html>; Internet; accessed 3 September 2007.

¹⁹ Stone, "Perilous Times; Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism."

²⁰ "Eugene V. Debs."

²¹ Stone, "Perilous Times; Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism."

²² "Executive Order 9066: The President Authorizes Japanese Relocation," linked from *George Mason University's History Matters Page*, available from <http://historymatters.gmu.edu/d/5154>; Internet; accessed 3 September 2007.

²³ "Executive Order 9066: Resulting in the Relocation of Japanese (1942)," linked from *Our Documents Home Page*, available from <http://www.ourdocuments.gov/doc.php?flash=true&doc=74>; Internet; accessed 3 September 2007.

²⁴ "Civil Liberties Act of 1988," linked from the *University of Dayton's Race, Racism and the Law Page*, available from <http://academic.udayton.edu/race/02rights/intern01.htm#Civil%20Liberties%20Act%20of>; Internet; accessed 3 September 2007.

²⁵ James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *The New York Times*, 16 December 2005 [newspaper on-line]; available from <http://www.nytimes.com/2005/12/16/politics/16program.html>; Internet; accessed 3 September 2007.

²⁶ Russ Feingold, "On The Anti-Terrorism Bill," linked from *Senator Russ Feingold's Home Page*, available from <http://feingold.senate.gov/speeches/01/10/102501at.html>; Internet; accessed 3 September 2007.

²⁷ "Foreign Intelligence Surveillance Act," linked from the *Federation of American Scientists Home Page*, available from <http://www.fas.org/irp/agency/doj/fisa/>; Internet; accessed 3 September 2007.

²⁸ Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

²⁹ "Foreign Intelligence Surveillance Act Orders 1979-2006," linked from the *Electronic Privacy Information Center's Home Page*, available from http://www.epic.org/privacy/wiretap/stats/fisa_stats.html; Internet; accessed 3 September 2007.

³⁰ Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

³¹ *Foreign Intelligence Surveillance Act, U.S. Code*, Title 50, chap. 36, sec. 1805 (1978).

³² John Podesta, "USA Patriot Act: The Good, the Bad, and the Sunset," *Human Rights Magazine*, Winter 2002 [journal on-line]; available from <http://www.abanet.org/irr/hr/winter02/podesta.html>; Internet; accessed 4 October 2007.

³³ George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, 16 March 2006), 12.

³⁴ Ibid.

³⁵ "Public Law 107-40," linked from *Public and Private Laws: Main Page*, available from http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ040.107; Internet; accessed 4 October 2007.

³⁶ "USA PATRIOT Act (H.R. 3162)," linked from *Electronic Privacy Information Center Home Page*, available from <http://www.epic.org/privacy/terrorism/usapatriot/>; Internet; accessed 4 October 2007.

³⁷ Ibid.

³⁸ Feingold.

³⁹ "USA PATRIOT Act (H.R. 3162)."

⁴⁰ James Madison, "Federalist No. 10," *New York Packet*, 23 November 1787.

⁴¹ Bryan Horrigan, *Adventures In Law And Justice: Exploring Big Legal Questions In Everyday Life* (Sydney, NSW: University of New South Wales Press, 2003), 247.

⁴² Adas, 57-58.

⁴³ "FINAL VOTE RESULTS FOR ROLL CALL 398," linked from the *Office of the Clerk for the U.S. House of Representatives Home Page*, available from <http://clerk.house.gov/evs/2001/roll398.xml>; Internet; accessed 9 November 2007.

⁴⁴ U.S. Supreme Court, "UNITED STATES v. UNITED STATES DISTRICT COURT, 407 U.S. 297 (1972)," linked from *FindLaw's Legal Professionals Channel*, available from <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=407&invol=297>; Internet; accessed 9 November 2007.

⁴⁵ "USA PATRIOT Act (H.R. 3162)."

⁴⁶ Tim Golden, "After Terror, a Secret Rewriting of Military Law," *The New York Times*, 24 October 2004 [newspaper on-line]; available from <http://www.nytimes.com/2004/10/24/international/worldspecial2/24gitmo.html>; Internet; accessed 9 November 2007.

⁴⁷ Ibid.

⁴⁸ Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

⁴⁹ Feingold.

⁵⁰ Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

⁵¹ "Foreign Intelligence Surveillance Act Orders 1979-2006."

⁵² *Foreign Intelligence Surveillance Act, U.S. Code*, Title 50, chap. 36, sec. 1805 (1978).

⁵³ Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

⁵⁴ "FBI cast a wide net when getting phone records," *USA Today*, 9 September 2007 [newspaper on-line]; available from http://www.usatoday.com/tech/news/surveillance/2007-09-08-fbi_N.htm; Internet; accessed 4 October 2007.

⁵⁵ Dan Eggen, "Key Part of Patriot Act Ruled Unconstitutional," *The Washington Post*, 30 September 2004, sec. A, p. 16.

⁵⁶ Edith Honan, "Judge strikes down part of Patriot Act," *Reuters*, 6 September 2007 [newspaper on-line]; available from <http://www.reuters.com/article/domesticNews/idUSN0634907320070906>; Internet; accessed 4 October 2007.

⁵⁷ Ibid.

⁵⁸ Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

⁵⁹ Jeffrey Rosen, "Conscience of a Conservative," *The New York Times Magazine*, 9 September 2007 [journal on-line]; available from <http://www.nytimes.com/2007/09/09/magazine/09rosen.html>; Internet; accessed 8 December 2007.

⁶⁰ Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

⁶¹ "Spy chief cited in Verizon suit," *Colorado Springs Gazette*, 31 August 2007, sec. A, p. 3.

⁶² "Ore. lawyer in court over Patriot Act," *USA Today*, 10 September 2007 [newspaper on-line]; available from http://www.usatoday.com/news/nation/2007-09-10-patriotact-lawsuit_N.htm; Internet; accessed 4 October 2007.

⁶³ Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

⁶⁴ "Bush administration seeks power to grant US telecom companies immunity for spy program," *International Herald Tribune*, 31 August 2007 [newspaper on-line]; available from <http://www.ihf.com/articles/ap/2007/09/01/america/NA-GEN-US-Spy-Program-Immunity.php>; Internet; accessed 4 October 2007.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Joby Warrick, "Domestic Use of Spy Satellites To Widen," *The Washington Post*, 16 August 2007, sec. A, p. 1.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Nat Hentoff, "Citizens Resist War on the Bill of Rights," *Free Inquiry*, Fall 2002 [journal on-line]; available from http://www.secularhumanism.org/library/fi/hentoff_22_4.html; Internet; accessed 9 November 2007.

⁷¹ Geoffrey Stone, et al., *Government Surveillance: Civil Liberties and The War on Terror*, Conference Paper (Washington, DC: American Constitution Society for Law and Policy, 18 June 2004).

⁷² Hentoff.

⁷³ Feingold.

⁷⁴ *U.S. Constitution*, Amendment IV.

⁷⁵ Ibid., Amendment V.

⁷⁶ George W. Bush, "President Bush Pushes for Homeland Security Department," November 2002, available from <http://www.whitehouse.gov/news/releases/2002/11/20021112-1.html>; Internet; accessed 4 October 2007. Remarks by the President at District of Columbia Metropolitan Police Operations Center, Washington, DC.

⁷⁷ *U.S. Constitution*, art. 2, sec. 1.

⁷⁸ George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, 17 September 2002), 30.

⁷⁹ "Kennedy v. Mendoza-Martinez," linked from *Louisiana State University Law Center's Medical and Public Health Law Page*, available from <http://biotech.law.lsu.edu/cases/pp/MENDOZA-MARTINEZ.htm>; Internet; accessed 9 November 2007.

⁸⁰ Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

⁸¹ U.S. Government Accountability Office, "B-230595, Oct 12, 1988, 68 Comp.Gen. 19," linked from the Principles of Federal Appropriations Law (Red Book) Home Page, available from <http://redbook.gao.gov/12/fl0059638.php>; Internet; accessed 8 December 2007.

⁸² Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

⁸³ *U.S. Constitution*, art. 1, sec. 8.

⁸⁴ Ibid., art. 2, sec. 2.

⁸⁵ Richard A. Epstein, "Executive Power on Steroids," linked from the *Cato Institute Home Page*, available from http://www.cato.org/pub_display.php?pub_id=5557; Internet; accessed 8 December 2007.

⁸⁶ Rosen.

⁸⁷ Ibid.

⁸⁸ Ellen Nakashima and Joby Warrick, "House Approves Wiretap Measure," *The Washington Post*, 5 August 2007, sec. A, p. 1.

⁸⁹ Greg Miller, "Spy chief sheds light on wiretaps," *Los Angeles Times*, 23 August 2007, sec. A, p. 14.

⁹⁰ Nakashima and Warrick, 1.

⁹¹ James Risen and Eric Lichtblau, "Concerns Raised on Wider Spying Under New Law," *The New York Times*, 18 August 2007 [newspaper on-line]; available from <http://www.nytimes.com/2007/08/19/washington/19fisa.html>; Internet; accessed 8 December 2007.

⁹² Nakashima and Warrick, 1.

⁹³ "Fact Sheet: The Protect America Act of 2007," linked from *The White House Home Page*, available from <http://www.whitehouse.gov/news/releases/2007/08/20070806-5.html>; Internet; accessed 8 December 2007.

⁹⁴ John W. Dean, "The So-Called Protect America Act: Why Its Sweeping Amendments to the Foreign Intelligence Surveillance Act Pose Not Only a Civil Liberties Threat, But a Greater Danger As Well," linked from *FindLaw's Legal News and Commentary Page*, available from <http://writ.news.findlaw.com/dean/20070810.html>; Internet; accessed 8 December 2007.

⁹⁵ Risen and Lichtblau, "Concerns Raised on Wider Spying Under New Law."

⁹⁶ Dean.

⁹⁷ "FBI cast a wide net when getting phone records," *USA Today*, 9 September 2007 [newspaper on-line]; available from http://www.usatoday.com/tech/news/surveillance/2007-09-08-fbi_N.htm; Internet; accessed 4 October 2007.

⁹⁸ Nakashima and Warrick, 1.

⁹⁹ Dean.

¹⁰⁰ Rosen.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Podesta.

¹⁰⁴ Jon B. Gould, "Playing With Fire: The Civil Liberties Implications of September 11th," *Public Administration Review* (September 2002): 74-79.

¹⁰⁵ Ibid.

¹⁰⁶ "Alito: No Person Is Above the Law," linked from *FOXNews Politics Page*, available from <http://www.foxnews.com/story/0,2933,181052,00.html>; Internet; accessed 8 December 2007.

¹⁰⁷ *U.S. Constitution*, art. 2, sec. 1.

¹⁰⁸ "Preparing for the 21st Century – An Appraisal of U.S. Intelligence," linked from the *U.S. Government Printing Office Home Page*, available from <http://www.access.gpo.gov/intelligence/int/pdf/report.html>; Internet; accessed 8 December 2007.

¹⁰⁹ "US Intelligence and Security Agencies," linked from the *Federation of American Scientists Home Page*, available from <http://www.fas.org/irp/official.html>; Internet; accessed 8 December 2007.

¹¹⁰ "Preparing for the 21st Century – An Appraisal of U.S. Intelligence."

¹¹¹ Rebecca Grant, "Actionable Intelligence," *Air Force*, June 2007 [journal on-line]; available from <http://www.afa.org/magazine/june2007/0607intelligence.asp>; Internet; accessed 8 December 2007.

¹¹² Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

¹¹³ *Foreign Intelligence Surveillance Act, U.S. Code*, Title 50, chap. 36, sec. 1805 (1978).